Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER 1975 TERM

Docket No. 75-1750

AL DAYON, Individually and on Behalf of Mastercraft Electronics Corp.,

Appellant,

-against-

DOWNE COMMUNICATIONS, INC., THE AETNA CASUALTY AND SURETY COMPANY AND H. WILLIAM KEHL, as Sheriff of the City of New York,

Appellees.

On Appeal From the Court of Appeals for the State of New York

MOTION TO DISMISS APPEAL

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MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION PURSUANT TO RULE 16

DOWNE COMMUNICATIONS, INC. ("DCI") plaintiff-appellee moves pursuant to Rule 16 of the Rules of the Supreme Court of the United States to dismiss this appeal on the ground that Appellant has no right of Appeal to this Court under 28 U.S.C. §1257(2) and on the ground that the appeal does not present a substantial federal question, indeed it presents no federal question at all with respect to DCI, and on the further ground that the alleged federal question was neither raised in or passed on by the New York Court of Appeals. In addition, the judgment appealed from rests upon an adequate non-federal basis.

NO FEDERAL QUESTION IS PRESENTED WITH RESPECT TO APPELLEE, DCI

The appellant in his jurisdictional

statement questions the validity of two New York statutes. These statutes deal with poundage and levying and relate solely to the Sheriff; they have no application to DCI.

The only questions raised by appellant with respect to DCI concern the affirmance by the New York Court of Appeals of the grant of summary judgment. Appellant alleges that this action resulted in a denial of due process and of equal protection. This position is untenable.

The award of summary judgment to DCI was not based on the statutes whose validity has been drawn into question, rather the judgment in favor of DCI on the attachment bond was made because no triable issue of fact existed as to appellant's liability.

The question of whether summary judgment has been properly granted is

purely a question of state law which this Court has held it has no jurisdiction to review. In United States v. Pink, 315 U.S. 203, 62 S.Ct. 552 (1942), this Court declined to review a decision of the New York Court of Appeals affirming summary judgment and stated (at U.S. 216):

> "We agree with those contentions. It is in accord not only with the motion papers but also with the Ruling of the New York Court of Appeals that the Moscow case 'left open no question which has been argued upon this appeal.' In view of that ruling, we are not free to inquire, as petitioner suggests, into the propriety under New York practice of grounding the motion for summary judgment on the record in the Moscow case. That is distinctly a question of state law on which New York has the last word."

Appellant has attempted to give this state law issue Constitutional dimensions by raising due process and equal protection claims. This Court has dealt with such claims before and stated in

Enterprise Irrigation District v. Farmer's Mutual Canal Company, 243 U.S. 157, 37 S.Ct. 318 (1917) (at U.S. 166):

> "The claim that the court, in disposing of some of the questions including that of the estoppel, misconceived or misapplied the statutory and common law of the state, and thereby infringed the due process and equal protection clauses of the 14th Amendment, requires but brief notice. The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law. (Citations omitted) The questions presented other than those relating to the validity of the state board's adjudication, all turned exclusively upon the law of the state, and the state court's decision of them is controlling." (citations omitted)

This Court addressed itself to the same issue in McDonald v. Oregon R. S. Nav. Co., 233 U.S. 665, 34 S.Ct. 772 (1913), and in dismissing for want of jurisdiction stated (at U.S. 669-70):

> "It is elementary and needs no citation of authority to show that the due process clause of the fourteenth amendment does not control methods of state procedure or give jurisdiction to this court to review mere errors of law alleged to have been committed by a state court in the performance of its duties within the scope of its authority concerning matters non-federal in character."

Appellant's argument though couched in Constitutional terms seeks nothing more than a review of the application of local law by a state court. The United States Supreme Court has no jurisdiction to entertain such a request.

APPELLANT HAS NO RIGHT TO APPEAL PURSUANT TO 28 U.S.C. 1257(2)

Appellant's attempt to appeal to this Court as of right pursuant to 28 U.S.C. 1257(2) is equally without merit.

The New York Court of Appeals decision does not explicitly or implicitly pass upon or consider the constitutional

validity of the statutes drawn into question. The issue of validity was neither timely nor properly raised nor even seriously argued by appellant. The decision as regards DCI rests upon ordinary principles of contract law which is an adequate non-federal basis and does not concern itself with any federal questions, substantial or otherwise.

In Raley v. State of Ohio, 360 U.S. 423, 79 S.Ct. 1257 (1959), this court stated (at U.S. 434-35):

> "We must examine our jurisdiction over these appeals. Appellants assert jurisdiction under 28 U.S.C. §1257(2), 28 U.S.C.A. §1257(2), a grant of jurisdiction on appeals, 'where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.' In their notices of appeal to this Court, appellants have phrased some of their federal constitutional claims as attacks on the constitutionality of the Ohio statute authorizing the Commis-

> sion and the statute providing for immunity. But this does not suffice:
>
> 'It is essential to our jurisdiction on appeal * * * that there be an explicit and timely insistence in the state courts that a state statute, as applied, is repugnant to the federal Constitution, treaties or laws.' Charleston Federal Savings & Loan Ass'n v. Alderson, 324 U.S. 182, 185, 65 S.Ct. 624, 627, 89 L.Ed. 857."

It is submitted that appellant has failed to properly invoke the jurisdiction of this Court and that therefore this Court has no jurisdiction of this appeal.

WHEREFORE, it is respectfully requested that this unwarranted appeal should be dismissed for lack of jurisdic-

tional requirements with all costs being assessed against Appellant.

Respectfully submitted,

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